JD(ATL)–17–15
San Juan, PR

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

TRIPLE-S SALUD, INC

and **Case 12-CA-143450**

UNION GENERAL DE TRABAJADORES, LOCAL 1199, SERVICE EMPLOYEES INTERNATIONAL UNION

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and Ana Ramos, Esq.,
for the General Counsel.
Alicia Figueroa-Llinas, Esq.,
for the Company.
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for the Union.

DECISION

Statement of the Case

William Nelson Cates, Administrative Law Judge. This case was tried before me in San Juan, Puerto Rico, on July 14, 2015[1]. The charge initiating this case was filed by Union General de Trabajadores, Local 1199, Service Employees International Union (Union) on December 23, against Triple-S Salud, Inc., (the Company). After an investigation by counsel for General Counsel (government) of the National Labor Relations Board (Board), acting through its Regional Director for Region 12, issued a Complaint and Notice of Hearing (complaint) on April 28, 2015. The complaint alleges the Company, on or about November 12, eliminated the full day paid holiday benefits for the Eugenio Maria de Hostos and the Jose de Diego holidays that were previously paid to the unit employees pursuant to the parties' collective-bargaining agreement, without the Union's consent. It is alleged the Company, by this conduct, has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its unit employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act.

[1] All dates here are 2014 unless otherwise specified.

The Company, in its answer to the complaint, and at trial, denies having violated the Act in any manner alleged in the complaint.

The government contends the Company combined the two holidays with a third holiday, namely Presidents' Day but only paid the unit employees for one holiday, and did so without the Union's consent. The government further contends the Company is obligated, by the parties collective-bargaining agreement, to continue the separate holidays until it negotiates any changes with the Union. The government contends that even after the Union objected to the consolidation of the separate holidays, unit employees nevertheless were required to work both the "Eugenio Maria de Hostos" and "Jose de Diego" holidays, and only paid regular pay for the work performed on each of those two days. The government asserts the new consolidation of holidays had the effect of eliminating two days of paid holiday leave to which the unit employees were contractually entitled.

The government contends the case is not appropriate for deferral to arbitration because no construction of the contract is relevant for evaluating the reasons, advanced by the Company, for failing to comply with any applicable contract provisions. The government contends this is not an interpretation issue but rather a clear violation of the Act by the Company's failure to continue in full force and effect certain terms and conditions of the parties' collective-bargaining agreement.

The Company contends that any and all changes it made with respect to holidays were permitted by the parties' collective-bargaining agreement and/or Puerto Rico Law No. 111 of July 29, 2014, which amended 1 L.P.R.A. (Laws of Puerto Rico Annotated) Sections 71 and 84, and, which repealed 1 L.P.R.A. Sections 75 and 77. The Company contends specifically that the party's collective-bargaining agreement does not establish specific dates which the holidays must be observed, but rather refers to Puerto Rico law; particularly the Puerto Rico Closing Law. The Company contends the Puerto Rico Closing Law eliminated both the "Eugenio Maria de Hostos" and the "Jose de Diego" holidays long ago but the parties continued to observe those days as they were recognized by the Puerto Rico Political Code. The Company contends after the Puerto Rico Political Code was amended in 2014 to change the dates the two holidays were to be observed, the Company simply followed the dispositions of Puerto Rico Law No. 111. The Company contends that the case here requires an interpretation of both Puerto Rico law and the collective-bargaining agreement and that the matter should be deferred to arbitration.

The Company contends it has not violated the Act in any manner alleged in the complaint and the case should be dismissed.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. The parties entered into a written Joint Motion and Stipulation of Facts consisting of 7 pages with 17 paragraphs, or bullet points, of stipulated facts; and, with 8 specifically referenced Joint Exhibits (1–8) all of which were

received into the record.[2] I have studied the whole record, and based on the detailed findings and analysis below, I conclude and find the Company violated the Act as indicated.

FINDINGS OF FACT

I. JURISDICTION, LABOR ORGANIZATION STATUS AND SUPERVISORY AND/OR AGENCY STATUS

The Company is a Puerto Rico corporation with offices in San Juan, Ponce, Arecibo, Caguas and Mayaguez, Puerto Rico (Company facilities), where it has been, and continues to be, engaged in the business of selling insurance policies and related services in the Commonwealth of Puerto Rico. In the past 12 months ending April 28, 2015, a representative period, the Company purchased and received at its Puerto Rico facilities goods valued in excess of $50,000 from suppliers located outside the Commonwealth of Puerto Rico. The parties admit, and I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The parties admit, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

The parties admit, and I find that Company Human Resources Vice President Iraida Ojeda (HRVP Ojeda) has been, and continues to be, a supervisor and agent of the Company within the meaning of Section 2(11) and (13) of the Act.

II. ALLEGED UNFAIR PRACTICES

A. Facts

The facts set forth here are not in dispute and are from the party's stipulation of facts.

The following employees of the Company (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time Storage Assistants, Storage Clerks, Mail Clerks, External Messengers, Requests Controllers, Credentials Clerks,

[2] To the extent it could be perceived, the Joint Motion and Stipulation of Facts, as a separate document, is not part of the 8 Joint Exhibits (it was not specifically labeled) is dispelled by the following transcript excerpts. Government counsel described the Joint Motion and Stipulation of Facts and the 8 Joint Exhibits thusly; "We want[ ] to point out that the parties have reached and signed [a] joint motion and stip [stipulation of] facts. The Joint Motion and Stipulation of Facts has been signed by the General Counsel, by . . . the Charging Party, and by the Respondent" Tr. 8, L's 15–21. When the Joint Motion and Stipulation of Facts and 8 Joint Exhibits were proffered by government counsel I noted; "The General Counsel has . . . presented the joint motion and stipulation of facts with eight attachments, consisting of Joint Exhibits 1 through 8. And it is my understanding that all of the parties [have] agreed that this constitutes the record from which the decision should be made." Each party affirmed my understanding. The parties also submitted a Joint Motion Clarifying the Record (which I accept as a part of the stipulation of facts) correcting the date the "Jose de Diego Holiday" was observed in 2014, which was April 21 rather than May 21.

Independent Agent Services Officers, Digital Equipment Operators, Telephone/Switchboard Operators, Receptionists, General Office Clerks, Clinical Office Clerks, Property Control Clerks, Collectors, Purchasing Clerks, Graphic Arts Technicians, Accounting Clerks, Accountants I, Predetermined Dental Requests Examiners, MM Reimbursement Examiners, Home/Host Claims Examiners, Claims and Adjustments Examiners, Provider Recruitment and Admissions Officers, Services Officers, Pharmacy Service Officers, Medicare Services Representatives, Services Representatives, Optimo Medicare Services Representatives, Secretaries, Accountants II, Sales Representatives, and Service and Renewal Representatives employed by the Employer at its offices located in San Juan, Ponce, Arecibo, Caguas and Mayagiiez, Puerto Rico or at any other regional office or annex established in Puerto Rico within the Appropriate Unit; excluding: all professional employees, confidential employees, secretaries and the messenger from the Office of the President; secretaries and the messenger for the Board of Directors; secretaries from the Office of the Executive Vice-President; secretaries for the Senior Vice-President of Professional and Medical Matters; secretaries from the Division of Vice-Presidents, secretary for the Internal Legal Adviser, secretaries for the Directors of the Internal Auditing and Budget Offices, technical personnel, Confidential Secretary and administrative employees from the Human Resources Division, management employees, guards and supervisors, auditing officers, other persons with the authority to hire, fire, promote, discipline or in any other way, vary employee status or make recommendations to that effect, personnel that perform labor pursuant to a student employment program, and employees who are performing temporary labor.

At all times since about May 11, 1977, and specifically at all times material here, the Company has recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from August 1, 2012 to July 31, 2016. At all material times here, and since at least May 11, 1977, based on Section 9(a) of the Act, the Union has been the designated collective-bargaining representative of the unit.

Article 29, "Holidays" of the party's current collective-bargaining agreement effective from August 1, 2012 to July 31, 2016 states:

ARTICLE 29 "Holidays"
Section 1 - From January 1, 2007, employees covered by this Agreement shall enjoy full payment for all the regular working hours, without working, the following days or part of days at the regular rate of pay on the dates in which days are observed under the Closing Act.

1. New Year's day
2. January 5 (Day before Three Kings' Day)
3. Three Kings' Day
4. Eugenio Maria de Hostos holiday
5. Presidents' Day

6. Abolition of Slavery Holiday
7 Jose de Diego Holiday
8. Maundy Thursday (day before Good Friday)
9. Good Friday
10. Memorial Day
11. US Independence
12. Puerto Rico Constitution Day
13. Labor Day
14. Puerto Rico Discovery Day
15. Thanksgiving
16. Day after Thanksgiving
17. December 24
18. Christmas Day
19. December 31

General Election day will be observed every four years. If any of the above days are eliminated from the Closing Act, the parties will agree on the date (that will be) observed. No social activity will be held before or after December 24 and 31 and January 5.

Section 2 - Every employee who works during a holiday or the free part of a half holiday shall receive compensation at a rate of two times his/her regular hourly rate.

Section 3 - Those days that are declared in the future legal holidays in Puerto Rico as provided by the Closing Act, if it were applicable to the Company, shall also be considered holidays or partial holidays with pay and shall be included as part of the above list.

Section 4 - Every holiday recognized by this agreement that falls on a Sunday shall be observed the following Monday.

The Closing Act referred to in article 29 of the current collective-bargaining agreement between the Company and Union remains in effect, as amended. It was originally enacted on December 1, 1989.

The Company's 2014 holiday leave calendar distributed to its unit employees included separate holiday dates for the local Puerto Rico holidays of "Eugenio Maria de Hostos Holiday," which the Company observed on January 13, and which traditionally has been observed on the second Monday of January, and the "Jose de Diego Holiday" which the Company observed on April 21, and which traditionally has been observed on the third Monday of April, and the "President's Day Holiday" which the Company observed on February 17, and which traditionally has been observed on the third Monday of February.

In 2014, the Company paid the unit employees for holiday pay at their regular pay rate for all of their regular working hours, without requiring them to work, for the "Eugenio Maria de Hostos Holiday" observed on January 13, for the "Jose de Diego Holiday" observed on April 21, and for the "President's Day Holiday" observed on February 17. The Company paid each unit employee who worked on any/or all three of the holidays at two times his or her hourly wage rate for the hours worked.

As in 2014, during each of the years from 2007 through 2013, the Company paid its employees in the unit holiday pay for three separate holidays listed above, at the rates described in article 29 of the collective-bargaining agreement and on the traditional days of observance of those holidays.

On November 12, the Company distributed its 2015 holiday leave calendar to the unit employees by electronic mail. The Company's 2015 holiday leave calendar, and the electronic mail message by which the Company sent it to the unit employees reflects in part as follows:

Monday	February 16th	President's Day and Puerto Rican Patriots Day (including Eugenio Maria Hostos Day and Jose de Diego Day)

The Company's 2015 holiday calendar, shows that the "Eugenio Maria de Hostos Holiday," the "Jose de Diego Holiday," and the "President's Day Holiday" are referred to in a single holiday called "President's and Puerto Rican Patriots Day," and scheduled to be observed on February 16, 2015.

The Company did not notify the Union of its intent to observe the "Eugenio Maria de Hostos Holiday," the "Jose de Diego Holiday," and the "Presidents Day Holiday" on the "Presidents and Puerto Rican Patriots Day" before the Company issued its 2015 holiday leave calendar to the unit employees on November 12.

On December 1, at a meeting between Company Human Resources Vice President Iraida Ojeda, Company Human Resources Office Manager Mirza Villafalie, Union Representative Fernando Juarbe, and bargaining unit employee and Shop Steward Jose Herrero, the Union objected to the changes to holidays for the unit employees that had been announced in the Company's 2015 holiday calendar. At the meeting, the Company insisted it was permitted to make the changes in holidays because of the passage of Law 111. The Union continues to take the position it does not agree to the change to holidays announced in the Company's 2015 holiday calendar. At the meeting, the Union and the Company agreed to submit their dispute regarding the changes to holidays to an accelerated arbitration procedure under the grievance procedure established in the parties' collective-bargaining agreement. The Union filed the necessary grievance before the Puerto Rico Department of Labor on December 2 but no arbitration hearing has been held concerning the grievance, nor has a date been selected for an arbitration hearing.

The Company did not pay its unit employees holiday pay for the second Monday of January 2015, previously the "Eugenio Maria de Hostos Holiday," or for the third Monday of April 2015, previously the "Jose de Diego Holiday." The Company did pay its unit employees a single day's holiday pay for "President's and Puerto Rican Patriots Day," which the Company observed on February 16, 2015.

The parties stipulated and I take official notice of certain Puerto Rico laws, specifically 1 Laws of Puerto Rico Annotated § 71, 75, 77 and 84. More specifically, 1 L.P.R.A. 71 is also known as Article 387 of the Puerto Rico Political Code; 1 L.P.R.A § 75 is also known as

Law No. 3 of March 15, 1939; 1 L.P.R.A. § 77 is also known as Law No. 3 of April 9, 1925; and 1 L.P.R.A § 84 is also known as Law No. 182 of December 1, 2010. 1 L.P.R.A. § 75 declared the anniversary (January 11) of the birth of Eugenio Maria de Hostos a legal holiday. 1 L.P.R.A. §77 declared April 16 a Jose de Diego Day holiday. 1 L.P.R.A. § 84 listed dates for the holidays to be observed. 1 L.P.R.A. § 71 addresses holidays in general and holidays to be observed in Puerto Rico for public employees. Law No. 111 of July 29, 2014 amended 1 L.P.R.A. §§ 71 and 84, and repealed 1 L.P.R.A §§ 75 and 77.

Law No. 111 provides a "Statement of Reasons" for the law, noting in part, it was necessary for greater competitiveness at the government level, with greater efficiency in providing services, and to maximize resources and establish a government structure that responds to the socio-economic reality of the Puerto Rican people in times of economic crisis. The "Statement of Reasons" noted that between state and Federal holidays, nineteen holidays were being celebrated in Puerto Rico, making it one of the jurisdictions with the greatest number of days off. The "Statement or Reasons" further noted ten Federal holidays had been extended to Puerto Rico through a provision in the Political Code of 1902. The "Statement of Reasons" pointed out that the United States Congress was only able to declare holidays for Federal employees and the District of Columbia, but that each state may enact their own commemorative days at their discretion. Law No. 111 decreed that "through this measure, the Puerto Rico Political Code of 1902 is being amended so that all holidays that shall be observed in our jurisdiction are clearly and precisely included in this code."

Law No. 111 Article 2 Section 1 "Holidays" established 10 holidays to be celebrated in Puerto Rico; with one of the holidays (No. 2), pertinent here, which reads as follows:

> 2. George Washington's Birthday, Presidents' Day and the Puerto Rican Patriots Day: Eugenio Maria de Hostos, Jose de Diego, Luis Munoz Rivera, Jose Celso Barbosa, Ramon Emeterio Betances, Roman Baldorioty de Castro, Luis Munoz Marin, Ernesto Ramos Antonini and Luis A. Ferre, shall be celebrated on the third Monday in February.

Law No. 111 Article 3 Puerto Rico Patriot Day reads as follows:

> In the Commonwealth of Puerto Rico, the third Monday in February of every year is being declared an official holiday which shall be known as "Puerto Rican Patriots Day": Eugenio Maria de Hostos' Jose de Diego, Luis Munzo Rivera, Jose Celso Barbosa, Ramon Emeterio Betances, Roman Baldorioty de Castro, Luis Munzo Marin, Emesto Ramos Antonini and Luis A. Ferre.
>
> Notwithstanding the above and although they shall not constitute a holiday, the following days shall continue being observed as days commemorating patriots:
>
> 1. January 11th as a day commemorating Eugenio Maria de Hostos.
> 2. April 16th as a day commemorating Jose de Diego.

Law No. 111 Article 7 "Application" reads as follows:

> The approval of this Law shall not undermine any approved collective bargaining agreement. The employees covered under said agreements shall be entitled to continue enjoying any established benefits pursuant thereof, while they are in effect, and up until its expiration or termination date. Once the collective bargaining agreement is expired, it must conform to the provisions of this Law. All new agreements must be negotiated pursuant to the provisions of this Law.

B. Mid-Term Contract Modification

The issue here is whether the Company violated Section 8(a)(5) and (1) of the Act by modifying its collective-bargaining agreement with the Union by consolidating two contractually-guaranteed holidays with a third contractually-guaranteed holiday without the Union's consent.

The Board in *San Juan Bautista Medical Center,* 356 NLRB No. 102, slip op. at 3 (2011), held:

> Absent the union's consent, a mid-term contract modification of a term governing a mandatory subject of bargaining violates Section 8(a)(5). See *Bonnell/Tredegar Industries,* 313 NLRB 789, 790 (1994), enfd. 46 F.3d 339 (4th Cir. 1995). An employer, however, can justify that conduct by articulating a "sound arguable basis" for believing that the contract allowed such a modification. See *Hospital San Carlos Borromeo,* 355 NLRB No. 26, slip op. at 1 (2010).

Section 8(d) of the Act defines the 8(a)(5) duty to bargain. Section 8(d) contains the various obligations, of which one is to bargain in good faith about terms and conditions of employment, and, a second is to continue in full force and effect the terms and conditions of an existing contract between the parties. A modification of the collective-bargaining agreement would be inconsistent with that latter obligation. The Board has long held Section 8(a)(5) and (1) and Section 8(d) of the Act prohibits an employer that is a party to a collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union. *Nick Robilotto Inc*., 292 NLRB 1279, 1279 (1989) (Board finds the employer's failure to pay pension contributions in accordance with its collective-bargaining agreement constituted an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) within the meaning of Section 8(d) of the Act).

The Board, has held that holiday pay is a form of wages and is a mandatory subject of bargaining. *Hospital San Cristobal,* 356 NLRB No. 95, slip op. at 1, fn. 3, and at 5 (2011). Unilaterally consolidating certain contractual paid holidays to reduce the number of paid holidays constitutes material and substantial changes. See, e.g. *Fresno Bee,* 339 NLRB 1214, 1215 (2003).

Government counsel establishes, within the meaning of Section 8(d) of the Act, a *prima facie* violation of Section 8(a)(5) and (1) of the Act, when she shows the Company made a material and substantial change in terms and conditions of employment, that are mandatory subjects for the purposes of bargaining, without the Union's consent.

The parties' current collective-bargaining agreement, effective from August 1, 2012 to July 31, 2016, at article 29 "Holidays" establishes 19 unit employee holidays including three separate holidays for "Eugenio Maria de Hostos Holiday"; "Jose de Diego Holiday"; and, "Presidents Day Holiday".

The Company's published 2014 holiday calendar included these three holidays celebrating the "Eugenio Maria de Hostos Holiday" on January 13, the second Monday of January; the "Jose de Diego Holiday" on April 21, the third Monday of April; and the "President's Day Holiday" on February 17, the third Monday of February. As was the case with the 2014 leave calendar, the Company, for the years 2007 through 2013, paid unit employees for the three separate holidays on the traditional days of observance for these holidays.

The Company paid the contractual rates for each of those years. The rates, as set forth in the collective-bargaining agreement, called for unit employees to be paid their regular pay rate for their regular hours of work without requiring the unit employees to work. But, if a unit employee had to work on any or all of the three specific holidays, the employee was paid two times the hourly wage rate for the hours worked.

On November 12, the Company distributed its 2015 holiday calendar by electronic mail to unit employees in which it informed the unit employees it had consolidated the "Eugenic Maria de Hostos," "the Jose de Diego" and, the "President's Day" holidays into a single holiday captioned: "President's Day and Puerto Rican Patriots Day (including Eugenio Hostos Day and Jose de Diego Day)." The consolidated holiday was scheduled for and observed on February 16, 2015.

The Company did not notify the Union of its intention to consolidate the three holidays and only paid unit employees for one holiday.

At a meeting between the Union and Company on December 1, the Union objected to the changes to the contractually required holidays. The Company contended, at the meeting, it was permitted to make the changes it did because of Law 111.

Based on the briefly described and undisputed facts outlined above, the government established, within the meaning of Section 8(d) of the Act, a *prima facie* violation of Section 8(a)(5) and (1) of the Act.

I next address whether the Company established justification for its conduct, consolidating three contractual holidays into one. Did the Company establish a showing of a "sound arguable basis" for believing the collective-bargaining agreement allowed the modifications it made? For the following reasons, I find the Company failed to establish any sound arguable basis for its actions.

The Company correctly notes in its post-trial brief that Article 29 Section 1 of the parties collective-bargaining agreement establishes 19 unit employee holidays, but does not specify the date on which each holiday will be observed except for January 5, December 24 and 31, with all other holidays to be observed on the dates in which they are observed under the Closing Act. The Company notes, in its post-trial brief, that the Puerto Rico Closing Act regulates the opening and closing of commercial establishments (stores) and does not apply to the Company here, but that the parties agreed to abide by its provisions regarding the dates on which holidays would be observed. The Company further notes, in its post-trial brief, the Closing Act has changed numerous times over the years and was amended in 1997 to eliminate certain holidays including the Eugenio Maria de Hostos and Jose de Diego holidays at issue here. The Company contends those eliminated holidays at issue here were continued to be observed because those holidays were included in Article 387 of the Puerto Rico Political Code of 1902 and Section 1 of Act No. 88 of June 27, 1969. The Company, in its post-trial brief, contends "the parties had reached a tacit understanding to continue recognizing those holidays since those days eliminated from the Closing Act continued to be holidays under the Political Code." The Company acknowledges that neither the Closing Act nor the Political Code apply to the Company, in as much as, the Political Code holiday provisions apply only to public employees.

In its post-trial brief, the Company states it continued to observe the holidays outlined in article 29 of the parties' collective-bargaining agreement until the Puerto Rico legislature, on July 29, 2014, in Law No. 111, amended the Puerto Rico Political Code and Law No. 88 of June 1969 so that all holidays for Puerto Rican Patriots would be observed on the same day, the third Monday of February including Eugenio Maria de Hostos and Jose de Diego. The Company contends the amendments to the Puerto Rico Political Code and Law No. 88 did not eliminate the holidays pertaining to Eugenio Maria de Hostos and Jose de Diego, but simply changed the date on which the holidays would be observed. The Company contends that in following the changes to the Puerto Rico Political Code, the collective-bargaining agreement automatically changed and the date for the Eugenio Maria de Hostos and Jose de Diego holidays was changed to the third Monday in February, but not eliminated. The Company explains it did not change the list of 19 holidays set forth in article 29 of the collective-bargaining agreement, nor eliminate any of the listed holidays; but rather, incorporated Puerto Rico law as to when those holidays would be observed.

That the Company failed to establish a sound arguable basis for its actions is demonstrated by a number of factors. The Company's reliance on certain laws of Puerto Rico to form its sound arguable basis defense is misplaced and without merit. The only statutes or Puerto Rico laws referenced in the parties' collective-bargaining agreement is the Puerto Rico Closing Act. Specifically, no references are made in the parties' collective-bargaining agreement to Law 111, the Puerto Rico Political Code, and specifically Article 387 thereof, or Law 88 of June 27, 1969, as amended by Law No. 182 of December 1, 2010. The parties' collective-bargaining agreement establishes that the dates on which the 19 contractual holidays will be observed (excluding those with specific dates already agreed to) will be on the dates observed under the Closing Act. The parties' collective-bargaining agreement further states at article 29 "Holidays" that if any of the 19 holidays "are eliminated from the Closing Act, the parties will agree on the date (that will be) observed." The Closing Act otherwise applies to the

opening and closing of retail businesses. There is no reference in the parties' collective-bargaining agreement that holidays eliminated from the Puerto Rico Closing Act must be eliminated from the parties' collective-bargaining agreement, nor that holidays eliminated by the Closing Act may be consolidated into a single holiday as the Company did here with the Eugenio Maria de Hostos, the Jose de Diago, and the President's Day holidays. It is noted that the Eugenio Maria de Hostos and the Jose de Diego holidays were actually eliminated from the Puerto Rico Closing Act in 1997; however, the Company continued celebrating those contractual holidays, including President's Day through 2014. The Company's contention that it continued to recognize those holidays because they were included in Article 387 of the Puerto Rico Political Code of 1902 and Section 1 of Law 88 of June 27, 1969 is without merit. As earlier noted, those laws are not part of, or mentioned in, the parties' collective-bargaining agreement.

Likewise, there is no factual basis on this record for the Company's contention; "The parties had reached a tacit understanding to continue recognizing these holidays since those days eliminated from the Closing Act continued to be holidays under the Political Code." Simply stated there is no reason, on this record, that the Company continued after 1997 to recognize the two holidays at issue here other than the Company was required to do so by the parties' collective-bargaining agreement.

I also find the Company's contention that because Puerto Rico Law 111 amended the Political Code, as well as, Law 88 and established a Puerto Rican Patriots Day, to be celebrated on the third Monday of February, the result was that the date on which the Eugenio Maria de Hostos and the Jose de Diego holidays would be celebrated changed, but did not eliminate those holidays. I reject the Company's contention that its actions were justified by these changes in Puerto Rico law. Stated differently, I reject the Company's contention that its unilateral action did not change the list of holidays, nor eliminate any holidays included in article 29, section 1 of the parties' collective-bargaining agreement, but that it merely changed the days for the holidays to be celebrated. Again, it is clear Law 111 does not apply to employers like the Company here, but rather applies only to public employees. Law 111 was established, as reflected in its Statement of Motives, to bring the number of holidays for Puerto Rico public employees in line with those observed elsewhere, to enhance excellence and productivity in public service, and reduce public spending but **not** to control the number of holidays the private sector might by agreement establish. Furthermore, Law 111 limits applicability, even for the public employees it covers, by stating that the approval of Law 111 shall not undermine any collective-bargaining agreement, and that established contractual benefits would remain in effect until the expiration or termination date of any applicable collective bargaining agreement. Thus, even if Law 111 were applicable here, which it is not, it would not impact the contractual holidays established by the parties' collective-bargaining agreement. The Puerto Rico Closing Act's applicability here, by its clear language, is only that if a contractual holiday is eliminated under the Closing Act, the parties are to **negotiate** the day for observing such holiday. Nothing in the clear language of the collective-bargaining agreement allows the Company to unilaterally eliminate or consolidate contractual holidays based on any changes to the Closing Act. Nothing in any of the laws relied upon by the Company justifies, or even establishes support for, the Company's position that an interpretation of the plain language of the parties' collective-bargaining agreement permitted its unilateral action. The Company's unilateral mid-term modification of the parties'

collective-bargaining agreement reducing the number of paid holidays for its unit employees without the Union's consent considered within the meaning of Section 8(d) of the Act violates Section 8(a)(5) and (1) of the Act and I so find.

C. Deferral to Arbitration

Pursuant to Board guidance, as articulated in *United Technologies Corp.,* 268 NLRB 557, 558 (1984) and *Collyer Insulated Wire,* 192 NLRB 837, 842 (1971), deferral of an unfair labor practice charge to the parties' grievance arbitration procedure is appropriate when a number of factors are established. Deferral is appropriate: if the dispute arose within the confines of a long and productive collective-bargaining relationship; if there is no claim of employer animosity to employees' exercise of protected rights; if the parties' collective-bargaining agreement provides for arbitration of a very broad range of disputes; if the arbitration clause clearly encompasses the dispute at issue; if the employer asserts its willingness to utilize arbitration to resolve the dispute; and, if the dispute is eminently well suited to resolution by arbitration. *United Technologies Corp.,* at 558. The burden of establishing that deferral is appropriate in the instant case rests with the Company. See, e.g., *Rickel Home Centers,* 262 NLRB 731, 731 (1982) and *Doctors' Hospital of Michigan,* 362 NLRB No. 149, slip op. at 13 (2015). The Board, in *San Juan Bautista Medical Center,* 356 NLRB No. 102, slip op. at 2 (2011), addressed the suitability of a dispute to resolution by arbitration holding a dispute is well suited to arbitration when the meaning of a contract provision is at the heart of the dispute but added:

> Deferral is not appropriate when no construction of the contract is relevant for evaluating the reasons advanced by Respondent for failing to comply with that contract provision. *Struthers Wells Corp.,* 245 NLRB 1170, 1171 fn. 4 (1979), enfd. mem. 636 F.2d 1210 (3d Cir. 1980), cert. denied 452 U.S. 916 (1981). Moreover, deferral is also not appropriate if the contract provision at issue is unambiguous. See, e.g., *New Mexico Symphony Orchestra*, 335 NLRB 896, 897 (2001).

Deferral is not appropriate if the dispute turns upon an interpretation of the Act and/or if the dispute turns upon statutory laws incorporated into the parties' collective-bargaining agreement. The expertise of an arbitrator is not needed to interpret the Act or such laws. See e.g. *San Juan Bautista Medical Center,* 356 NLRB No. 102, slip op. at 2–3 (2011).

The dispute here is not eminently well suited to resolution by arbitration. The language of article 29, "Holidays" is crystal clear and unambiguous. No issue of contract interpretation is presented. The language states unit employees, for the period from August 1, 2012 to July 31, 2016, "shall enjoy full payment for all regular working hours, without working, the following [19] days or parts of days at the regular rate of pay on the dates in which days are observed under the Closing Act." Simple enough, the unit employees, by their collective-bargaining agreement have 19 designated holidays. Language of the article also clearly states; "If any of the above days are eliminated from the Closing Act, the parties will agree on the date (that will be) observed." The language is clear that the parties are to negotiate the date for any holidays to be observed that are eliminated from the Closing Act and does not provide for the Company to unilaterally consolidate or eliminate the holidays. As the Board held in *Doctors'*

Hospital of Michigan, 362 NLRB No. 149, slip op. at 3–4 (2015), which holding is controlling here, deferral is not appropriate when the violation of the contract appears so obvious that there could not be a contrary interpretation by an arbitrator.

The Company's reliance on 1 L.P.R.A. Section 71 a/k/a Article 387 of the Puerto Rico Political Code; Section 1 of Law No. 88, and Law No. 111 is misplaced. None of these statutes are referred to, or mentioned, in the parties' collective-bargaining agreement. The only Puerto Rico law, the Closing Act, mentioned in the parties' collective-bargaining agreement simply establishes a procedure for the parties to negotiate a date for the observance of a specific holiday if the date in the Closing Act for that holiday is changed or eliminated.

In summary and for all the above reasons, I find that the Company, by eliminating two contractual holidays (namely Eugenio Maria de Hosto and Jose de Diego), for unit employees without the consent of the Union, engaged in conduct prohibited by the parties' collective-bargaining agreement and its action makes deferral inappropriate.

I reject any contention that the result I reach here does harm to the strong national policy favoring arbitration of labor disputes. There is simply nothing here that requires an arbitrator's expertise—the parties' collective-bargaining agreement clearly spells out the obligations of the parties regarding unit employees' holidays.

CONCLUSIONS OF LAW

1. The Company, Triple-S Salud, Inc., San Juan, Ponce, Arecibo, Caguas and Mayaguez, Puerto Rico, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Union General de Trabajadores, Local 1199, Service Employees International Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, Union General de Trabajadores, Local 1199, Service Employees International Union, has been and continues to be the exclusive bargaining representative for the purposes of collective bargaining within the meaning of Section 9(a) of the Act the following employees employed by Triple-S Salud, Inc.:

> All full-time and regular part-time Storage Assistants, Storage Clerks, Mail Clerks, External Messengers, Requests Controllers, Credentials Clerks, Independent Agent Services Officers, Digital Equipment Operators, Telephone/Switchboard Operators, Receptionists, General Office Clerks, Clinical Office Clerks, Property Control Clerks, Collectors, Purchasing Clerks, Graphic Arts Technicians, Accounting Clerks, Accountants I, Predetermined Dental Requests Examiners, MM Reimbursement Examiners, Home/Host Claims Examiners, Claims and Adjustments Examiners, Provider Recruitment and Admissions Officers, Services Officers, Pharmacy Service Officers, Medicare Services Representatives, Services Representatives, Optimo Medicare Services Representatives, Secretaries, Accountants II, Sales Representatives, and Service and Renewal Representatives employed by the Employer at its

offices located in San Juan, Ponce, Arecibo, Caguas and Mayagiiez, Puerto Rico or at any other regional office or annex established in Puerto Rico within the Appropriate Unit; excluding: all professional employees, confidential employees, secretaries and the messenger from the Office of the President; secretaries and the messenger for the Board of Directors; secretaries from the Office of the Executive Vice-President; secretaries for the Senior Vice-President of Professional and Medical Matters; secretaries from the Division of Vice-Presidents, secretary for the Internal Legal Adviser, secretaries for the Directors of the Internal Auditing and Budget Offices, technical personnel, Confidential Secretary and administrative employees from the Human Resources Division, management employees, guards and supervisors, auditing officers, other persons with the authority to hire, fire, promote, discipline or in any other way, vary employee status or make recommendations to that effect, personnel that perform labor pursuant to a student employment program, and employees who are performing temporary labor.

4. By unilaterally announcing and making mid-term modifications to the terms of the collective-bargaining agreement with the Union for unit employees regarding the Eugenio Maria de Hostos and the Jose de Diego holidays, without the Union's consent, the Company has been failing and refusing to bargaining collectively and in good faith with the exclusive bargaining representative of its employees within the meaning of Section 8(d) of the Act and in violation of Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices of Triple-S Salud, Inc., affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found the Company violated Section 8(a)(5) and (1) of the Act by its mid-term modification of unit employees' holidays eliminating the Eugenio Maria de Hostos and the Jose de Diego holidays, I recommended the Board require the Company to restore the Eugenio Maria de Hostos and the Jose de Diego holidays to the dates previously celebrated under the parties' collective-bargaining agreement. Additionally, it is recommended the Board order the Company to pay its unit employees for the eliminated holidays, with interest, computed as set forth in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Additionally, I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in **English** and **Spanish**, in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Company, Triple-S Salud, Inc., San Juan, Ponce, Arecibo, Caguas and Mayaguez, Puerto Rico, its officers, agents, successors, and assigns shall,

1. Cease and desist from

(a) Failing to bargain in good faith with Union General de Trabajadores, Local 1199, Service Employees International Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time Storage Assistants, Storage Clerks, Mail Clerks, External Messengers, Requests Controllers, Credentials Clerks, Independent Agent Services Officers, Digital Equipment Operators, Telephone/Switchboard Operators, Receptionists, General Office Clerks, Clinical Office Clerks, Property Control Clerks, Collectors, Purchasing Clerks, Graphic Arts Technicians, Accounting Clerks, Accountants I, Predetermined Dental Requests Examiners, MM Reimbursement Examiners, Home/Host Claims Examiners, Claims and Adjustments Examiners, Provider Recruitment and Admissions Officers, Services Officers, Pharmacy Service Officers, Medicare Services Representatives, Services Representatives, Optimo Medicare Services Representatives, Secretaries, Accountants II, Sales Representatives, and Service and Renewal Representatives employed by the Employer at its offices located in San Juan, Ponce, Arecibo, Caguas and Mayagiiez, Puerto Rico or at any other regional office or annex established in Puerto Rico within the Appropriate Unit; excluding: all professional employees, confidential employees, secretaries and the messenger from the Office of the President; secretaries and the messenger for the Board of Directors; secretaries from the Office of the Executive Vice-President; secretaries for the Senior Vice-President of Professional and Medical Matters; secretaries from the Division of Vice-Presidents, secretary for the Internal Legal Adviser, secretaries for the Directors of the Internal Auditing and Budget Offices, technical personnel, Confidential Secretary and administrative employees from the Human Resources Division, management employees, guards and supervisors, auditing officers, other persons with the authority to hire, fire, promote, discipline or in any other way, vary employee status or make recommendations to that effect, personnel that perform labor pursuant to a student employment program, and employees who are performing temporary labor.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Unilaterally announcing and making mid-term modifications to terms of the collective-bargaining agreement with the Union for the Eugenio Maria de Hostos and the Jose de Diego holidays without the Union's consent.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the right guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Restore the Eugenio Maria de Hostos and the Jose de Diego holidays to the dates previously celebrated under the parties' collective-bargaining agreement.

(b) Make all unit employees whole, with interest, for their losses as a result of the failure to observe the Eugenio Maria de Hostos and the Jose de Diego holidays.

(c) Within 14 days after service by the Region, post at its facilities at San Juan, Ponce, Arecibo, Caguas and Mayaguez, Puerto Rico, copies of the attached notice marked "Appendix"[4] in **English** and **Spanish**. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other materials. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facilities involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since November 12, 2014.

(d) Notify the Region Director for Region 12 in writing within 20 days from the date of this Order what steps the Company has taken to comply.

Dated, Washington, D. C. September 17, 2015

William Nelson Cates
Administrative Law Judge

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT refuse to bargain collectively in good faith with Union General de Trabajadores, Local 1199, Service Employees International Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time Storage Assistants, Storage Clerks, Mail Clerks, External Messengers, Requests Controllers, Credentials Clerks, Independent Agent Services Officers, Digital Equipment Operators, Telephone/Switchboard Operators, Receptionists, General Office Clerks, Clinical Office Clerks, Property Control Clerks, Collectors, Purchasing Clerks, Graphic Arts Technicians, Accounting Clerks, Accountants I, Predetermined Dental Requests Examiners, MM Reimbursement Examiners, Home/Host Claims Examiners, Claims and Adjustments Examiners, Provider Recruitment and Admissions Officers, Services Officers, Pharmacy Service Officers, Medicare Services Representatives, Services Representatives, Optimo Medicare Services Representatives, Secretaries, Accountants II, Sales Representatives, and Service and Renewal Representatives employed by the Employer at its offices located in San Juan, Ponce, Arecibo, Caguas and Mayagiiez, Puerto Rico or at any other regional office or annex established in Puerto Rico within the Appropriate Unit; excluding: all professional employees, confidential employees, secretaries and the messenger from the Office of the President; secretaries and the messenger for the Board of Directors; secretaries from the Office of the Executive Vice-President; secretaries for the Senior Vice-President of Professional and Medical Matters; secretaries from the Division of Vice-Presidents, secretary for the Internal Legal Adviser, secretaries for the Directors of the Internal Auditing and Budget Offices, technical personnel, Confidential

Secretary and administrative employees from the Human Resources Division, management employees, guards and supervisors, auditing officers, other persons with the authority to hire, fire, promote, discipline or in any other way, vary employee status or make recommendations to that effect, personnel that perform labor pursuant to a student employment program, and employees who are performing temporary labor.

WE WILL NOT make mid-term modifications to the holiday terms of our collective-bargaining agreement with the Union, without the Union's consent.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL bargain in good faith with Union General de Trabajadores, Local 1199, Service Employees International Union as the exclusive collective-bargaining representative of our employees in the above-described appropriate unit.

WE WILL restore to our employees in the bargaining unit represented by the Union the holiday terms they enjoyed before we modified those terms on November 12, 2014, and restore the Eugenio Maria de Hostos and the Jose de Diego holidays.

WE WILL make unit employees whole, with interest, for any losses suffered as a result of the unilateral changes that eliminated the Eugenio Maria de Hostos and the Jose de Diego holidays.

TRIPLE-S SALUD, INC.
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

201 East Kennedy Boulevard, Suite 530, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-143450 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2455.